United States Supreme Court,

OCTOBER TERM, 1901.

NICHOLAS C. BENZIGER and Louis Benziger, composing the firm of Benziger Bros.,
Petitioners,

vs.

UNITED STATES,
Respondent.

And now at this October Term, 1901, of this Court come the petitioners above named by their counsel and pray the Court to issue a writ of certiorari to review a decision of the U. S. Circuit Court of Appeals for the Second Circuit, affirming a decision of the Circuit Court of the United States for the Southern District of New York, which affirmed a decision of the Board of U. S. General Appraisers as to the rate and amount of duty on certain articles imported by your petitioners.

Statement.

In January, February and March, 1899, petitioners imported and entered at the Port of New York certain casts of sculpture which had been

imported by them for the use and by order of certain societies established for religious purposes (fols. 28, 29). The appraiser returned these goods as "church statues composed of plaster of Paris decorated," and the Collector assessed upon them a duty of 35% under Paragraph 450 of the Tariff Act of July 24, 1897 (folio 30). Against this classification and assessment the importers protested claiming the articles to be exempt from duty by virtue of the provision in Paragraph 649 of the Free List of the same Act for "casts of sculpture imported in good faith by order and for the use of a society incorporated for religious purposes" (folios 31–2). The protest was transmitted to the Board of General Appraisers, who took some evidence (fols. 73–225). They thereupon rendered a decision (fols. 34–65) overruling the protest and sustaining the collector's action. Petitioners thereupon filed a petition in the U. S. Circuit Court for the Southern District of New York for a review of this decision (fols. 4–16). No further evidence was taken in that Court. The case was heard on the record sent up by the Board of General Appraisers. The Circuit Court affirmed the decision of the Board. The opinion of the Circuit Court (per Townsend, J., appears in the record at fols. 226–237. The Circuit Court of Appeals (to which an appeal was taken) affirmed the decision of the Circuit Court *on the opinion of the Court below.*

Provision of Law to be Construed.

The only paragraph of the law with which the Court will need to concern itself is that relied on by the importer in his protest, as it is conceded in this case that if the imported articles were dutiable at all they were correctly classified by the

Collector. The paragraph relied on by the importer is Paragraph 649 of the Free List of the Tariff Act of July 24, 1897, which reads as follows:

> "Regalia and gems, statuary, and specimen or *casts of sculpture, where specially imported in good faith for the use and by order of any society incorporated or established solely for religious*, philosophical, educational, scientific or literary *purposes*, or for the encouragement of the fine arts, or for the use and by order of any college, academy, school or seminary of learning in the United States, or any State or public library and not for sale; but the term 'regalia' as herein used shall be held to embrace only such insignia of rank or office or emblems as may be worn upon the person or borne in the hand during public exercises of the society or institution and shall not include articles of furniture or fixtures or of regular wearing apparel nor personal property of individuals."

Special Reasons for Issuance of Writ.

These casts of sculpture for the use of churches have been and are frequent subjects of importation. A large number of religious institutions, especially those of the Roman Catholic faith are interested in the disposition of this question. The tax imposed is onerous. The amount already involved at this and other ports for duties already paid under protest is a very considerable sum. It is believed that the decisions sought to be brought under review have nullified the plain intention of Congress, and contrary to

the general spirit and intent of our tax laws, church property is subjected to heavy taxation. Congregations which call for this class of devotional objects are usually poor and struggling congregations, and the prices paid for these casts generally represent the small contributions of the poor. An interpretation of the law which increases by at least 1/3 the amount to be expended is one which should be free from all doubt, whereas, we submit, it is not only not free from doubt but manifestly erroneous. The Tariff Act construed by the Courts in this case is still in force, and no relief can be obtained against the continued exaction of these duties in the future unless a review in this Court can be obtained.

Argument.

The provisions of the Free List, upon which appellants rely, is for "casts of sculpture imported in good faith for the use of a society incorporated for religious purposes." The provision for casts of sculpture is unqualified. It is not required that the figures shall be of an artistic character or attain to the rank of works of art. It is not provided (as it is with reference to statuary) that they shall be professional productions of a sculptor. There is no limitation whatever.

The articles in question are not only *the* casts of sculpture which have been recognized for many years as the articles entitled to free admission, under provisions in the Tariff law corresponding with the one now under consideration, but, as is well known, they are the only kind of casts of sculpture that would be imported for the use of religious societies.

As early as 1885, the Treasury Department decided (SS. 7274) that four figures of various sizes,

which were cast or moulded from a mineral substance and decorated, were entitled to free entry under the provision of paragraph 759 of the Tariff Act of 1883 for casts.

In 1891 the Naval Officer at New York raised the same question as is here involved, and the Treasury Department thus replied to it (SS. 11747):

> "The Department believes that the crude or inartistic character of the figures under consideration cannot be urged as a reason for their exclusion from the benefits of free entry."
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> "It is fair to infer a liberal intention on the part of Congress from the fact of its inclusion of religious institutions among those to which the privilege of free entry is extended. Religious institutions are not schools of art, nor can congregations without adequate means always consult aesthetic rules in regard to the equipment of their churches. It is the sentiment of pious associations which gives the figure its efficiency as an aid to religious worship, and *the plaster cast may, in this way, be as serviceable to the humble worshipper as the more costly work of genius.*"

Again in 1893, the President of the Board of General Appraisers, Mr. George C. Tichenor (the author of the opinion of the Board of General Appraisers in this case) addressed a letter to the Department complaining of the free entry of articles of this character, claiming that they were "the products of a certain large manufacturer and importer of church statuary, images, etc.," and expressing the opinion that "the provision for the free admission of statuary

extended only to such works as were the inspired creations of the artist, rather than the works of the artisan or mechanic, the products of the factory or the workshop." This language will be noted as very similar to the language used in the opinion of the Board in the present case. To this communication the Department replied:

> "The comments of the Board upon the evident intention of Congress that the objects exempted from duty should be of such high order as to inspire admiration and devotional feeling, elevate the taste, educate and improve the mind, encourage fine art, and minister generally to the higher faculty of mankind, apply to paragraphs 692 and 465 (of the Tariff Act of 1890, which provide for statuary, the professional production of the statuary or sculptor only, and for statues, statuary, and for specimens of sculpture), and not to paragraph 677, *which provides without the restrictions enumerated in paragraph 465, and implied in paragraph 692 for the exemption from duty of all 'casts of plaster of Paris imported in good faith for the use of any society or institution incorporated or established for religious purposes.'*"
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> "Under the last named paragraph, it would appear *that any plaster casts which shall be regarded by a religious society as a desirable acquisition, and shall be classified by the Collector as coming within the terms of paragraph 677, may be imported free of duty without regard to its artistic character.*"
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> "The Department cannot interpret the provisions of paragraph 677 as establishing in any respect an aesthetic standard for such importations, and, without discussing the propriety

of such standards, must administer the law according to its apparent intent."

These decisions were before Congress when the present act was drawn. The Treasury Department had sharply called attention to the fact that the provision for casts of plaster of Paris did not contain any words indicating an artistic or æsthetic standard. There is no reason to doubt that in using the words "casts of sculpture" without qualification in paragraph 649 of the present act, Congress intended to continue the liberal policy referred to by the department with reference to articles imported for churches. There is nothing in the paragraph to indicate any intention of Congress to reverse a long-settled policy.

Casts imported for educational societies have been free of duty since 1816, and casts imported for churches have been free of duty since 1861. The policy of according free admission to articles imported for churches is one which should be approved by the Courts, and the tendency of judicial decisions should be to give such provisions a liberal interpretation, and not restrict their application by imposing qualifications and limitations which Congress, after having had its attention called to the matter, has seen fit not to impose.

The only effect of imposing such limitations as are suggested by the Board of Appraisers to the scope of this paragraph, would be to accord free admission to fine works of art imported for wealthy churches who could best afford to pay duty on them and deny a similar privilege to the humbler devotional works imported for struggling churches upon whom the burden of any duty would rest most severely.

In their opinion the Board of Appraisers suggest that Paragraph 649 provides for "statuary

and specimens or casts of sculpture;" that the articles in question cannot be both, and that they are known in commerce, art and common speech as statuary. It seems a sufficient answer to this to state that in common speech the articles in question are undoubtedly casts of sculpture; that commercial designation has nothing to do with this paragraph, and that the Treasury Department has constantly held that these articles are not statuary, as is shown by the citations already given. It will be noted that throughout this decision the Board takes great pains to refer to these articles as "molded," and carefully and sedulously refrains from using the term "cast." Of course, all casts are molded. The following are the definitions from Webster's dictionary of the word "cast," both as a verb and a noun:

Cast n., that which is formed in a mold; especially a reproduction or copy as of a work of art in bronze or plaster.

Cast v., to form in a particular shape by pouring liquid metal or other material into a mold.

It seems unnecessary to discuss the question whether these articles are, in fact, casts of sculpture. They are certainly so within any common or reasonable definition of the term.

The decision of the Circuit Court below (adopted by the Circuit Court of Appeals) seems from the concluding paragraph of its opinion to be chiefly based on the suggestion that these articles have ceased to be casts of sculpture because they are painted or gilded; or, to quote the language of the opinion "that they have been advanced by the skill of the artist from a mere manufacture from composition to a completed decorative object." We respectfully suggest that in according free ad-

mission to casts of sculpture imported for churches, Congress did not suppose it was providing for mere manufactures from composition. It obviously contemplated the importation of casts of sculpture so prepared as to be suitable for the decoration of churches, and it is well known that casts for these purposes require to be and usually are decorated. Churches (especially those of the denomination which most largely uses these devotional figures) are apt to be dimly lighted, and casts which were not colored could be appreciated only by those who stood close to them to examine their character. To perform their functions of so decorating a church that those seated in its pews may have their devotional feelings inspired, and their religious aspirations exalted by a contemplation of these figures, they require to be, and usually are colored, gilded and otherwise decorated. Congress knew of this as well as we know it, and it is a fanciful supposition that Congress intended that such articles, if imported in plain white, should be admitted free, but, if colored, should become dutiable as "manufactures of plaster of Paris."

In respect to this suggestion of the Circuit Court, the case of Hartranft v. Wiegmann (121 U. S., 609) is directly in point. The articles there in question were shells which had been cleaned, polished, ground on an emery wheel, and had the Lord's Prayer etched upon them. They had been classified as "manufactures of shell," and were claimed to be "shells, not manufactured." This Court thus disposed of the Government's contention:

> "We are of opinion that the shells in questior here were not manufactured, and were not manufactures of shell. *They were*

still shells. They had not been manufactured into a new and different article having a distinctive name, character, or use from that of a shell. The application of labor to an article either by hand or by mechanism, does not make the article necessarily a manufactured article within the meaning of that term as used in the tariff law."

Now we submit that the artistic labor, which had been applied to these casts of sculpture after they came from the mould to fit them for the purpose for which they were designated, had not converted them into anything but casts of sculpture. They were still casts. They had acquired no distinctive name, character or use. If we were dealing with two provisions of the dutiable schedules, one of which provided for casts of sculpture at a higher duty than that provided for manufactures of plaster of Paris, or earthy or mineral substances, would it be seriously contended that the importer of these articles could change them from casts of sculpture to manufactures of plaster of Paris for the purpose of obtaining the benefit of a lower rate of duty by painting or gilding them or performing other work upon them which better fitted them for the use for which they were intended?

For the reasons above stated the writ of certiorari should issue as hereinbefore prayed.

Dated New York, May 15, 1902.

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